Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

VICTOR VELEZ,
Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For Writ Of Certiorari
To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

STEVEN A. GREENBERG
(*Counsel of Record*)
JEREMY LAMARCHE
STEVEN A. GREENBERG, LTD.
820 W. JACKSON BLVD., SUITE 310
CHICAGO, IL 60607
(312) 879-9500
Attorneys for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether the introduction of evidence of Petitioner's post-arrest silence and consultation with his counsel, introduced during the jury trial of the non-testifying Petitioner, who had remained silent and consulted with counsel after receiving his *Miranda* warnings, violated the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, and is barred by a logical extension of *Doyle v. Ohio, 426 U.S. 610 (1976)*.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are those appearing in the caption to this Petition.

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STATEMENT OF JURISDICTION

The Final Judgment of the Illinois Supreme Court denying review was entered on May 28, 2009. Appeal Denied by *People v. Velez, 232 Ill.2d 594, 2009 Ill. LEXIS 531 (May 28, 2009).* The jurisdiction of this Court is invoked under *28 U.S.C. Section 1257(a).*

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in part, provides:

> No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const., amend. V.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const., amend. XIV, Sec. 1.

INTRODUCTION

During Petitioner's jury trial the court allowed the prosecutor to introduce evidence the Petitioner, who did not testify, had, post-*Miranda*, invoked both his right to remain silent and to consult with counsel. The admission of evidence that Petitioner was silent, met with counsel and chose to again remain silent, violated Petitioner's rights under the Fifth Amendment of the United States Constitution and the Due Process Clause of the Fourteenth Amendment (*United States Constitution, U.S. Const. Amends. V and XIV*).

Previously, this Court has held that a defendant who testifies cannot be impeached by silence that followed *Miranda* warnings, but can be challenged with pre-*Miranda* silence. *Doyle v. Ohio, 426 U.S. 610 (1976); Anderson v. Charles, 447 U.S. 404 (1980).* This Court has not previously considered whether there is a complete bar to evidence that a defendant exercised his *Miranda* rights when the defendant does not testify.

The opportunity now presents itself to extend the protections of *Miranda* and *Doyle* to include a complete bar to the use of post-Miranda silence against a non-testifying defendant. An absolute ban.

STATEMENT OF THE PROCEEDINGS BELOW

On December 29, 2003, Roselee Soto, the wife of the victim, Jose Soto, went to meet her husband at a bar to bring him some money. (BB-47-53). Jose walked up to the passenger side of her car, she gave him the money, and as he began walking back into the bar, he was shot and killed. Ms. Soto identified Jesus Vegas, the co-defendant, as the shooter. (BB-59). Ms. Soto never saw Petitioner Victor Velez. (BB-112). There were no other eyewitnesses.

On January 9, 2004, eleven days after the murder, Petitioner was arrested. The detective provided *Miranda* warnings. Petitioner remained silent. The following morning a defense attorney arrived at the police station. After consultation, Petitioner again exercised his right to remain silent and to act only through counsel. (C-114).

The detectives who were working on the case were aware "*VELEZ was now exercising (sic) his right to remain silent.*" (C-120). Yet, one claimed that later that day, at 9:25 p.m., Petitioner said, "*He wished to talk to me.*" Petitioner told him that he had a lawyer and the "*lawyer did tell him not to speak with the detectives.*" The detective asked, "*Do you still want to speak with me?*" and after Petitioner replied yes, the two had an incriminating conversation. (T-49) No one testified to the substance of this conversation at trial.

On January 11, 2004, at approximately 1:15 a.m., a prosecutor wrote out a statement from Petitioner (App. pg.41). Petitioner described his role as a lookout. After reviewing the statement, they each signed the document. (CC-126). Within the statement was a narration of Petitioner's request for counsel and post-*Miranda* invocation of silence. The statement was admitted at trial, read to the jury, and given to them to take into their deliberations. (CC-129) [1] It read, in part:

> Victor met with an attorney, Ezra Hemphill, on January 10, 2004. He met with the attorney in the afternoon and then told the detectives that he wanted an attorney. Later, on January 10th, Victor knocked on the door of his interview room and told the detectives that he wanted to talk to them without an attorney. Victor told Det. Day and Det. Kolman that he wanted to make a statement without his lawyer. After he told the Detectives he wanted to talk

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[1] In addressing this issue the lower Court noted, "Prior to trial, the State raised the issue of the propriety of the contested portion of defendant's statement and the court, with defense counsel's encouragement, determined that the challenged portion was admissible and not a violation of *Doyle* because defendant ultimately chose to speak to the detectives. We agree with that determination." *903 N.E. 2d at 56.* Although requested to do so, the lower Court did not find either waiver or invited error.

> without a lawyer, (initials omitted) Det. Kolman read him his Miranda rights again. Victor then made a statement to the detectives.
>
> On January 10th, at 9:45 PM, Victor met with ASA Bischoff who asked him whether he initiated the conversation with the detectives. Victor told ASA Bischoff that he knocked on the interview room door and told the detectives he wanted to make a statement. ASA Bischoff advised him of his rights and Victor told ASA Bischoff about the shooting. (App. pg.41).

The State did not have any witness who saw Petitioner at the scene.

Petitioner did not testify.

Convicted of the murder (as was his co-defendant, Vega), Petitioner, who was on bond while awaiting trial, was sentenced to 45 years in prison. (HH-56). He must serve his entire sentence. He will be released on October 23, 2050.

The lower court rejected Petitioner's claim of error, finding it insignificant to the analysis that he failed to testify. Instead, the Court held that a later waiver automatically applied retroactively, allowing for the admission of Petitioner's earlier, post-*Miranda* silence. *Velez, 903 N.E. 2d at 56.* The Illinois Supreme Court declined discretionary

review. *People v. Velez, 232 Ill. 2d 594, 2009 Ill. LEXIS 531 (Ill., May 28, 2009).*

REASONS FOR GRANTING THE WRIT

"*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogations in both state and federal courts." *Dickerson v. United States, 530 U.S., 428, 431 (2000).* The assurance silence will not be used is implicit in the *Miranda* warnings. It is fundamentally unfair and a deprivation of due process to allow a testifying defendant's post-*Miranda* silence at trial. *Doyle v. Ohio, 426 U.S. 610, 618 (1976). Miranda* is not supposed to be a trap. *Johnson v. Acevedo, 572 F. 3d 398, (7th Cir., 2009)(slip opinion at 7).*

The issue for the Court is whether the Petitioner's eventual statement to the police, long after he had invoked his right to remain silent, opened the door to the admissibility of his post-*Miranda* silence, when Petitioner did not testify.

The Court, despite an extensive body of Fifth Amendment case law, has never answered this question. At a minimum, the Court should extend the protections of *Miranda* and *Doyle* to be absolute when a defendant fails to take the stand.

While the Court has allowed pre-*Miranda* silence to impeach (*Jenkins v. Anderson, 447 U.S. 231 (1980)*), the Court has not considered post-

Miranda silence against a non-testifying defendant.[2] Petitioner did not testify. Logically, and legally, his silence should be inadmissible.

In Illinois, the Court's Fifth and Fourteenth Amendment holdings do not persuade. Instead, ignoring the Court's holdings, the lower court resolved this heretofore-ripe issue in direct conflict with any logical reading or extension the Court's precedent. In Illinois, post-*Miranda* silence is admissible against a defendant who does not testify. Indeed, whether the defendant testifies is irrelevant, it does not even breach the analysis.

The Illinois Appellate Court wrote:

> "*Doyle* applies only when a defendant invokes his right to remain silent." *People v. Patterson, 217 Ill. 2d 407, 445 (2005).* Although it is uncontested that defendant did invoke his right to remain silent at some point, we have also

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[2] In *Greer v Miller, 483 U.S. 756, 764 (1987)*, the Court wrote: "It is significant that in each of the cases in which this Court has applied *Doyle*, the trial court has permitted specific inquiry or argument respecting the defendant's post-*Miranda* silence. See *Jenkins v. Anderson, supra, at 233-234* (extended questioning and closing argument reference); *Anderson v. Charles, supra, at 405-406* (questioning); *Fletcher v. Weir, supra, at 603-604* (questioning); *South Dakota v. Neville, supra, at 564* (admission of refusal to take blood-alcohol test); *Wainwright v. Greenfield, supra, at 285, 287* (closing argument)". See also *Kansas v. Ventris, 129 S. Ct. 1841 (2009)* (allowing evidence obtained in violation of the sixth amendment to impeach the defendant's testimony).

> determined that defendant expressly reinitiated the dialogue with Detective Kolman, thus waiving his *Miranda* rights. "Once the right to remain silent has been waived, it can be invoked only by a defendant's positive assertion that he wants to remain silent." *Patterson, 217 Ill. 2d at 445.* The record does not support, and defendant does not contend, that he ever reasserted his right to remain silent. Accordingly, *Doyle* does not apply to the case at bar". *903 N.E. at 56.*

The lower Court recognized Petitioner had initially chosen to remain silent. Still, confusingly, the lower Court conditioned admissibility on a requirement of reassertion. Shockingly, the failure of Petitioner to testify was immaterial.

The Court has never limited the protections of *Miranda* or *Doyle* to cases where the defendant remains wholly silent. Nor has this Court ever required that there be a re-assertion of silence in order to prohibit evidence of prior silence. Reassertion is immaterial to the Court's analysis. According to this Court, whether the defendant testifies is of paramount importance, but it is beside the point in Illinois. Respectfully, Illinois is creating its' own set of rules to govern the admissibility of post-*Miranda* statements, and thumbing its' nose at the Court's precedent and guidance.

The Court has made it clear that "the prosecution may not... use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation" when he was "under police custodial interrogation." *Miranda v. Arizona, 384 U.S. 436, 468 N. 37 (1966).*

The ruling in Illinois conflicts with precedent, is inconsistent with the only Federal Courts to address parallel issues, and flies in the face of the Court's superior authority to decide constitutional questions.[3]

In *Doyle*, this Court affirmed the bar on the use of a defendant's silence by the prosecutor when the defendant chose to testify at trial. The Due Process Clause of the Fourteenth Amendment was offended when the prosecutor sought to impeach the defendant's exculpatory testimony by cross-examining him about his post-arrest silence, after he had received *Miranda* warnings. The Court wrote, "While it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Doyle, supra, at 618 (1976).* The rationale behind this holding is that after a defendant has been read his *Miranda* rights and

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[3] See *United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997); Pitts v. Anderson, 122 F.3d 275, 280 (5th Cir. 1997); United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993); United States v. May, 52 F.3d 885, 890 (10th Cir. 1995); United States v. Harrold, 796 F.2d 1275, 1279 (10th Cir. 1986); United States v. Laury, 985 F.2d 1293, 1104 (5th Cir. 1993),* and *United States v. Caruto, 532 F.3d 822 (9th Cir. 2008).* Discussed below.

chosen to remain silent, he has been induced by the government to stay silent through the promise his silence will not be used against him. *Hockenbury v. Sowders, 718 F.2d 155, 159 (6th Cir. 1983).*

The right to remain silent includes the right to consult with counsel, and evidence of consultation following *Miranda* is likewise barred. *Wainwright v. Greenfield, 474 U.S. 284, 295 fn.13 (1986).* "*Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Id at 291.*[4]

Over the years the Court has limited the scope of the rule announced in *Doyle.* In *Jenkins v. Anderson, 447 U.S. 231 (1980),* a prosecutor questioned a defendant on trial for murder and asked him why he had not told anybody about the crime in the two weeks prior to his arrest, and also commented on the defendant's pre-arrest silence during closing arguments. *Jenkins, 447 U.S. at 233.* By highlighting the defendant's pre-arrest silence, the prosecutor was attempting to impeach his credibility and claim of self-defense, by suggesting that the defendant would have spoken out if he had killed in self-defense. *Id. at 236.* The Court held that the defendant's silence was not induced by government action because any silence occurred before his arrest and before receiving any *Miranda*

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[4] *Wainwright* appears to be the only time the Court considered *Doyle* when a defendant did not testify; holding the exercise of *Miranda* rights could not be introduced to impeach an insanity claim. Wainwright did not testify.

warnings. *Id. at 240.* Consequently, the fundamental unfairness present in *Doyle* was not there. *Id.*

The Court further clarified the reach of *Doyle* when it decided *Anderson v. Charles, 447 U.S. 404 (1980).* In *Anderson*, the defendant was arrested while driving a stolen vehicle that belonged to an individual who had been murdered less than a week before. *Id. at 404.* Immediately after receiving *Miranda* warnings, the defendant told the police officers where he had stolen the car. At trial, the defendant testified he actually took the car from another location. During cross-examination, the prosecutor asked the defendant why he had not come forward and told the police officers the same story he told the jury. *Id. at 406.* The Court held that *Doyle* did not apply to cross-examination that merely inquired into prior inconsistent statements. The questioning did not make unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings had not been induced to remain silent. *Id. at 408.*

In *Fletcher v. Weir, 455 U.S. 603 (1982)*, the Court explained the reading of *Miranda* rights and not the arrest gave rise to the express assurance silence will not carry any penalty. *Id at 606.* Thus, it was not a *Doyle* violation when a prosecutor cross-examined the defendant on his post-arrest silence that occurred before any reading of *Miranda* rights.

Id. See also, *Brecht v Abrahamson, 507 U.S. 619 (1993)*[5]

Each of these cases involved a testifying defendant. Conversely, the case at bar involves a non-testifying defendant. The Court has not allowed the erosion of *Doyle* to include those who do not testify. The Court has not recognized, nor should it, the notion of a complete waiver of a right to be silent post-*Miranda* when a defendant does not testify. While Opinions like *Charles v. Anderson* suggest that a defendant can waive portions of his post-

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[5] In *Brecht,* the Court addressed both pre- and post-*Miranda* silence:

> "The Court of Appeals characterized *Doyle* as "a prophylactic rule." *944 F.2d at 1370.*It reasoned that, since the need for *Doyle* stems from the implicit assurance that flows from *Miranda* warnings, and "the warnings required by *Miranda* are not themselves part of the Constitution,"... "*Doyle* is . . . a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." *Ibid.* But, *Doyle* was not simply a further extension of the *Miranda* prophylactic rule. Rather, as we have discussed, it is rooted in fundamental fairness and due process concerns. However real these concerns, *Doyle* does not "'overprotect'" them. *Duckworth v. Eagan, 492 U.S. 195, 209, 106 L. Ed. 2d 166, 109 S. Ct 2875 (1989)* (O'CONNOR, J., concurring). Under the rationale of *Doyle,* due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence. *Doyle* thus does not bear the hallmarks of a prophylactic rule." *Brecht at 629.*

Miranda silence by testifying inconsistently at trial, simply at some time answering police officers questions after *Miranda* warnings are read can not mean that a defendant's right to silence has been abandoned.

Only Illinois, interpreting the Court's Fifth Amendment jurisprudence, allow post-*Miranda* silence to be admitted against a non-testifying defendant, for any purpose, whenever the defendant gives a subsequent statement.

Contrary to the logic of *Doyle,* and the fact Petitioner sat mute at trial, the jury heard testimony about his post-*Miranda* silence, and a recital was provided to them within defendant's written statement, for deliberations. *903 N.E. 2d 49.*

It is impossible to ignore the inference the jury naturally drew from the fact Petitioner was silent in the face of accusation, needed counsel, consulted with counsel, and then invoked again.

The reasoning behind the prohibition, articulated in *United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997)*, is that evidence about silence would unduly burden the Fifth Amendment privilege. Moreover, a prosecutor's comment on post-custodial silence would implicitly focus upon the Defendant's right to remain silent at trial, calling a jury's attention to the fact that he has not risen to remove whatever taint existed from the post-custodial silence. The *Moore* court explained: "*Doyle* is an exception to an exception to the general rule. The general rule regarding a defendant's silence is that it cannot be used. The defendant's testifying creates

an exception allowing the testimony to be used for the purpose of impeachment. The presence of the *Miranda* warning before the silence causes an estoppel that restores to the defendant the protection against the use of the silence. Both the majority and the dissent in *Doyle* make that plain." *Moore, 104 F.3d at 387.*

It is noteworthy that *Doyle* and its progeny involve instances where a defendant chose to testify and a prosecutor, to impeach, introduced evidence of the defendant's post-*Miranda* silence. In this case, the Defendant never testified. There was nothing to impeach! Nevertheless, the State was able to introduce evidence that the Defendant invoked his right to remain silent and met with an attorney. This case turns *Miranda* and *Doyle* on their heads, allowing evidence when a defendant does not testify that would be inadmissible if he did.

Here, the Defendant received *Miranda*, invoked his right to remain silent, and spoke with an attorney. Thus, the Defendant did receive and relied upon the government's "implicit assurance." *Greer v. Miller, 483 U.S. 756, 763 (1987).* Regardless of the statements made by the Defendant hours later, his *Doyle* rights applied and his post-*Miranda* silence should have been protected. See *Anderson v. Charles, 447 U.S. at 408* (a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent, but the use of a defendant's silence is barred if it follows the receipt of a government assurance).

By allowing the Defendant's post-*Miranda* silence into evidence the Illinois Court has created a new rule: *the government's assurance that one's silence will not be used is void as soon as the person speaks. Moreover, it is retroactively void.* Because of the new rule, a defendant must be completely silent, forever, or not at all. The effect of the rule is that a prosecutor can introduce evidence that a defendant invoked his right to remain silent, post-*Miranda*, without any inconsistent statements or the defendant testifying. If there is any delay in speaking, the prosecutor can cite the delay and argue "Why didn't he speak, because he is guilty," or "Why did he need his lawyer to come to the station, and why did the lawyer tell him to shut up...because he is guilty."

Defense counsel argued Petitioner's statement was unreliable. The use of his silence compromised that claim. It is impossible to ignore the inferences naturally drawn from the fact Petitioner felt he needed counsel, consulted with counsel, and then invoked. It is exactly the speculation the Court has been careful to guard against. The jury heard that the Defendant met with a lawyer and then refused to answer any questions. No limiting instruction was provided, leaving jurors free to contemplate if guilt motivated the Defendant to invoke: '*hmmm, why would he refuse to talk unless he had something to hide?*' The jurors were free to add together the silence after consultation and the eventual statement in deciding whether the statement was true.

It would be foolhardy to presume that the jurors did not believe the Defendant's lawyer told him to be silent because he was guilty. *Doyle*, and cases decided since, attempt to bar this speculation by insuring the jurors do not learn that a non-testifying defendant invoked. The underlying rationale of the constitutional bar against admitting evidence of a defendant's post-arrest silence is the well-founded concern that such evidence is only minimally probative, while possessing a high potential for prejudice to the defendant's case. *Doyle v. Ohio, supra at 617-20;* and *United States v. Hale, 422 U.S. 171, 177, 95 S.Ct. 2133, 2137, 45 L.Ed.2d 99 (1975).*

Petitioner did not testify. Nonetheless, the jury heard that he had invoked his right to remain silent, after meeting with counsel, long before changing his mind and later completing a written statement. The idea that the silence of a non-testifying defendant, or his consultation with defense counsel, is admissible, for any purpose, is unique, unprecedented, and illogical.[6] Petitioner has not uncovered a like decision, where a court has allowed

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[6] The Opinion was originally unpublished under Illinois Supreme Court Rule 23. In a Motion to Publish, the State of Illinois claimed this holding established a new rule of law or modified, explained, or criticized an existing rule of law.

evidence of a non-testifying defendant's silence.[7] It cannot be reconciled with the Courts' rulings.

While the Court has not addressed the admissibility of evidence that a non-testifying defendant invoked his right to remain silent met with counsel before later giving an incriminating statement, Federal Appellate Courts have discussed whether partial silence provides a complete waiver of all *Miranda* rights. The answer is no.

In *United States v. Casamento, 887 F.2d 1141, 1179 (1989)*, the Second Circuit Court of Appeals pointed out that "for the purposes of analysis under *Doyle*, even if a defendant has made statements to the police after receiving *Miranda* warnings, he is deemed to have maintained his silence, unless the post-arrest statements are inconsistent with the defendant's testimony at trial."

The Fifth Circuit explored partial silence, post-*Miranda*, and whether a testifying defendant waives all constitutional protections conferred by *Miranda* and *Doyle* by giving a statement to the police. In *Pitts v. Anderson, 122 F.3d 275, 280 (5th Cir. 1997)*, the Court of Appeals noted, "*Charles [v. Anderson]* does not mean that anytime a defendant makes a post-*Miranda* statement the prosecution has carte blanche to use the defendant's silence to impeach him." The protection set forth in *Miranda*

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[7] Defendant's efforts included, in addition to counsel's research, list-serve requests to the members of the NACDL and Illinois Association of Public Defenders.

and defined in *Doyle* and *Anderson* do not disappear once an incriminating statement is made.[8]

Likewise, the Tenth Circuit has considered the effect incriminating statements have on one's right to claim protection under *Doyle*. In *United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993)*, the Court of Appeals noted that "this court has recognized when a defendant answers some questions and refuses to answer others, or in other words is "partially silent," this partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*." *Id. at 486. See also United States v. May, 52 F.3d 885, 890 (10th Cir. 1995)*. The Court was clear, to the extent that a

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[8] See also *United States v. Laury, 985 F.2d 1293, 1104 (5th Cir. 1993)*, in which the defendant made post-*Miranda* statements, which mostly included the defendant denying committing the crime. After testifying that he was at a birthday party in Dallas and could not have committed the alleged crime, the defendant was cross-examined and asked whether he told police about his alleged alibi. On appeal, the defendant claimed his due process rights were violated. The Court of Appeals noted that the fact that the defendant did not remain completely silent following his arrest did not give the prosecutor unbridled freedom to impeach him by commenting on what he did not say following his arrest. The Court of Appeals went onto state that, "we have not found any analogous cases where the prosecution attempted to impeach the defendant with post-arrest and trial statements that were not inconsistent. The relevant cases are either a clear *Doyle* case—where the defendant remained completely silent following arrest, but gave an exculpatory story at trial...or a clear *Anderson* case—where the defendant gave a statement to the police, and then gave a clearly inconsistent story at trial."

defendant clearly relies on a *Miranda* warning to refuse to answer specific questions, he has been induced by the government to do so and his silence may not be used against him. *United States v. Harrold, 796 F.2d 1275, 1279 (10th Cir. 1986).*

The Petitioner chose to not testify, so his silence was not introduced into evidence to impeach any inconsistent statement he gave. The only argument that can be made as to the admissibility of the Petitioner's silence is that by eventually talking to police officers, the Petitioner lost any and all rights and protections he had under *Miranda* to remain silent. The State argued this point at the appellate level and the Illinois Appellate Court chose to agree with the State. The problem with the argument is that there is no case law to support it and it is completely contrary to the well-grounded law. *See Anderson, 447 U.S. at 407.*

The Illinois Appellate Court was wrong when it stated that because the Petitioner expressly reinitiated dialogue with detectives he waived his right to not have his previous silence or the fact that he consulted with an attorney used against him, when he did not testify. *903 N.E. 2d at 56.*

The Court has never deviated from its' holding that post-*Miranda* silence is not admissible unless, as in *Anderson*, it is being used to impeach a prior inconsistent statement. The Court ought now adopt a bright line rule prohibiting post-*Miranda* silence unless a defendant testifies.

CONCLUSION

The Petition for Writ of Certiorari must be granted.

Respectfully submitted,

STEVEN A. GREENBERG
(*Counsel of Record*)
JEREMY LAMARCHE
STEVEN A. GREENBERG, LTD.
820 W. JACKSON BLVD.,
SUITE 310
CHICAGO, IL 60607
(312) 879-9500
Attorneys for Petitioner

People v. Velez

No. 1-06-0912

APPELLATE COURT OF
ILLINOIS, FIRST DISTRICT,
THIRD DIVISION

388 Ill. App. 3d 493; 903
N.E.2d 43; 2009 Ill. App.
LEXIS 34; 327 Ill. Dec. 946

February 4, 2009, Decided

SUBSEQUENT HISTORY: Released for Publication March 25, 2009.

Appeal denied by People v. Velez, 232 Ill. 2d 594, 2009 Ill. LEXIS 531 (Ill., May 28, 2009)

PRIOR HISTORY:

Appeal from the Circuit Court of Cook County, Illinois. No. 04 CR 3039-02. Honorable Michael P. Toomin, Judge Presiding.

DISPOSITION: Affirmed.

COUNSEL: For Defendant-Appellant: Steven A. Greenberg, Chicago, IL.

For Plaintiff-Appellee: Richard A. Devine, State's Attorney, Cook County, James E. Fitzgerald, Michelle Katz, Matthew Connors, Chicago, IL.

JUDGES: JUSTICE MURPHY delivered the opinion of the court. QUINN and COLEMAN, JJ., concur.

OPINION BY: MURPHY

OPINION

JUSTICE MURPHY delivered the opinion of the court:

Following a jury trial, defendant, Victor Velez, was convicted of first-degree murder and sentenced to 45 years' imprisonment. On appeal, defendant contends that: (1) his counsel was ineffective for withdrawing a motion to suppress his statement and for failing to file a motion to quash his illegal arrest; (2) he was denied his right to a fair trial when the State impermissibly introduced testimony, in violation of Doyle v. Ohio, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976), regarding his refusal to speak to the police after invoking his right to counsel; (3) the trial court erred in allowing admission of gang-related evidence; (4) the cumulative errors

deprived him of his right to a fair trial; (5) the evidence was insufficient to prove him guilty beyond a reasonable doubt on a theory of accountability; and (6) his sentence was excessive.

The facts adduced at trial demonstrated that, on December 29, 2003, defendant accompanied his armed co-defendant, Jesus Vega,[1] to a bar in a "hot" neighborhood in order to retrieve money from the victim, Jose Soto. At some point in route, co-defendant informed defendant that he intended to shoot the victim if the victim did not produce the money. Co-defendant then provided defendant with a cellular telephone in case something went awry, instructing him to act as a lookout and to alert co-defendant if the police arrived on the scene. When the victim subsequently appeared outside the bar's entrance, co-defendant approached and shot him several times. Co-defendant then fled the scene; however, defendant remained nearby until co-defendant called him and confirmed that co-defendant shot the victim.

Prior to trial, defense counsel filed a "Motion to Suppress Statements Made During Improper Interrogation," maintaining that the police violated defendant's fourth and fifth amendment rights. At the subsequent hearing, Detective John Day testified that, on January 9, 2004, he and his partner, Detective Thomas Kolman, were investigating the

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[1] Co-defendant Vega is not a party to the instant appeal.

victim's murder when they learned that defendant had been brought to the police station. At approximately 8:30 p.m., Detectives Day and Kolman entered the unlocked interview room where defendant had been waiting for approximately 15 minutes. According to Detective Day, defendant was not under arrest at the time: he was not wearing any handcuffs; had not been photographed; and had not been fingerprinted. Prior to starting the interview, Detective Day read defendant his Miranda rights, which defendant immediately waived. The first interview lasted between an hour and an hour and a half, during which time, according to Detective Day, defendant implicated himself in the underlying crime. In relevant part, defendant admitted that he acted as a lookout while his fellow gang member, co-defendant, shot and killed the victim, who was also a fellow gang member.

Detective Day further provided that, after obtaining the statement, he requested that defendant take a polygraph examination. Defendant agreed despite the fact that the polygraph examiner was not available until the following morning. As a result, defendant remained at the police station overnight. In the interim, Assistant State's Attorney (ASA) James Papa arrived to interview defendant. After again being advised of his Miranda rights, defendant agreed to speak to ASA Papa in the presence of Detective Day. The interview lasted approximately 45 minutes, the contents of which were not

memorialized. The police then provided defendant with a cot in the interview room plus a beverage and a bag of potato chips. Throughout the time Detective Day spent with defendant on January 9, 2004, and the early morning hours of January 10, he did not recall defendant having requested an attorney or learning that an attorney called on defendant's behalf. When Detective Day concluded his shift and left the police station, defendant was not under arrest.

Detective Kolman testified at the hearing that he was back on duty during the afternoon of January 10, 2004. When he arrived at the police station, he learned that defendant had been placed under arrest at an unknown time and that defendant's attorney had arrived earlier in the day. Detective Kolman also learned that defendant had engaged his right to remain silent. Notwithstanding, at approximately 9:25 p.m., defendant knocked on the door of the interview room where he had remained and motioned to Detective Kolman. Detective Kolman subsequently opened the locked interview room door and asked defendant what he needed. Defendant responded that he wished to speak to him. Detective Kolman then asked defendant whether he had an attorney, and, if so, whether the attorney had advised defendant not to speak to the detectives. Defendant responded in the affirmative to both questions, thus Detective Kolman asked defendant whether he wished to speak to him despite those instructions.

Defendant assented. As a result, Detective Kolman readvised defendant of his Miranda rights, which he waived. Following a conversation lasting approximately 15 minutes, defendant requested to speak to an ASA.

Thereafter, the parties agreed to continue the hearing to accommodate defendant's witnesses; however, on the next scheduled date, defense counsel advised the court that he wished to withdraw the motion. In response, the court asked whether defense counsel had discussed the decision with defendant, and defense counsel replied that he had done so "in much detail." The court then admonished defendant as follows:

> "THE COURT: You understand, as I said, we've heard two witnesses on the motion and we're prepared to go forward with additional evidence, some evidence is here, but you're content with the decision, the advice of your attorney, to withdraw the motion at this time?
>
> DEFENDANT: Yes, your Honor.
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> THE COURT: You understand that once it's withdrawn it's not going to be filed again and litigated again. Do you understand that?
>
> DEFENDANT: Yes.

THE COURT: Nobody promised you anything to cause you to make that decision?

DEFENDANT: No.

THE COURT: Or threatened you?

DEFENDANT: No.

THE COURT: You're doing this of your on [sic] free will after consulting with your attorney; is that right?

DEFENDANT: Yes."

At trial[2], defense counsel stated, in opening, that the court would provide the jury with an accountability instruction, which "will have in its context the need for specific intent, an item, an action, a forwarding motion." The State subsequently objected and the court advised defense counsel to refrain from argument during opening statements. Defense counsel continued by urging the jury to focus on the State's burden of proof and consider that defendant took no part in the victim's murder, noting that defendant "was not necessarily in the area" where it took place.

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[2] A double jury trial was held for defendant and co-defendant.

Edna Aguayo then testified that, at the time in question, she lived with her mother and brother approximately one block away from the intersection of Armitage and Karlov Avenues. Co-defendant was her distant cousin and she had known defendant for some time because she was friends with his child's mother. Aguayo recalled that, on the night in question, co-defendant and defendant arrived at her home requesting a dark, hooded sweatshirt, which her brother provided to co-defendant. Approximately 15 minutes after the men left, Aguayo heard gunshots. As a result, Aguayo phoned her boyfriend. While speaking to him, she received another call, but could not recall from whom. Aguayo recalled being interviewed by Detective Vincent Viverito and his partner the day after the incident, but did not remember whether she told the detectives that the unidentified call was from defendant using co-defendant's cellular phone. Aguayo, however, admitted that she identified defendant as the caller during her grand jury testimony.

On cross-examination, Aguayo further admitted that, prior to the night in question, she had never spoken to defendant on the telephone; however, Aguayo averred that she could recognize his voice at the time because she had spoken to him in person on many occasions when she was with his child's mother.

Detective Viverito testified that, on December 30, 2004, Aguayo arrived at the police station and was

shown a photograph of defendant. According to Detective Viverito, Aguayo identified defendant as the individual with her cousin on the night in question. As a result of Aguayo's identification and his prior investigation, Detective Viverito stated that defendant was then considered a "person of interest."

Rosalee Soto, the victim's wife, testified that her husband and his cousin, Angel Navarro, were at a bar near the intersection of Armitage and Karlov Avenues on the night in question. Around 10:30 p.m., Rosalee drove to the bar to bring something to the victim and then left to retrieve money for him from an automated teller machine. She returned at approximately 11 p.m.; however, Rosalee remained in her car while the victim exited the bar to obtain the money. Following a brief conversation, Rosalee watched her husband walk back toward the bar. When he reached the establishment's door, Rosalee heard a gunshot and saw that co-defendant shot her husband from approximately four feet away. Rosalee's husband attempted to run to safety; however, co-defendant followed him in the direction of Rosalee's car then stopped and fired his handgun four or five more times at him. Rosalee testified that, at that time, she feared that co-defendant would attempt to shoot her as well; therefore, she drove from the scene. She eventually found her husband, who climbed into her car. Then, while in route to a hospital, Rosalee was in an accident with another vehicle. The police and an ambulance arrived shortly

thereafter and transported her husband to the hospital. Meanwhile, Rosalee provided the police with a description of the shooter. She later learned that her husband died from the gunshot wounds.

Rosalee further testified that, on January 10, 2004, the police arrived at her home and administered a photographic array. She did not identify her husband's offender at the time; however, Rosalee requested to view a lineup. Later that day, Rosalee went to the police station to view the lineup, at which time she positively identified co-defendant as her husband's offender.

On cross-examination, Rosalee stated that she did not see anyone other than co-defendant outside the bar when her husband was shot.

Navarro testified that he was inside the bar when he heard gunshots outside and took measures to protect himself. He emerged from the bar shortly thereafter and saw Rosalee driving the victim from the scene. Navarro followed Rosalee's car on his bicycle until Rosalee was in the accident. He then attempted to help the victim with his injuries.

On cross-examination, Navarro reported that he did not see defendant on the night in question, either before entering the bar or after exiting to attend to the victim.

ASA Jeannie Bischoff testified that she interviewed defendant on the evening of January 10,

2004, after she first spoke to the various detectives, Aguayo and Rosalee. Defendant agreed to speak to ASA Bischoff after being read his Miranda rights. Defendant chose to memorialize his statement in writing and it was published to the jury.

In his statement, defendant admitted that, on December 29, 2003, he accompanied co-defendant to Aguayo's house to obtain a sweatshirt. Thereafter, defendant asked co-defendant why they remained in a "hot" neighborhood. Co-defendant instructed defendant to "chill," revealing that he was armed with a handgun. Co-defendant then asked defendant to join him on a walk and they quickly made their way to a bar near the intersection of Armitage and Karlov Avenues. Co-defendant disclosed that he intended to retrieve money from an individual that was in the bar, adding that he intended to shoot the individual if the money was not repaid. Co-defendant then gave defendant a cellular phone and further instructed defendant to "watch [co-defendant's] back in case the police came and to call out 'yo' if defendant saw the police."

According to his statement, defendant stood across the street from the targeted bar on Armitage Avenue, while co-defendant paced back and forth around the corner from the bar on Karlov Avenue for approximately 20 to 25 minutes before the victim appeared. Then, while the victim spoke to someone in a car, co-defendant covertly moved closer to him.

Eventually the victim and co-defendant were face to face at which time co-defendant shot him. The victim then attempted to run away, but co-defendant fired another five or six gunshots at him. Thereafter, both the victim and co-defendant fled. Defendant subsequently moved to a nearby location and waited for an additional 30-40 minutes. Defendant then used the cellular phone to call Aguayo's house in order to ascertain co-defendant's whereabouts. Immediately thereafter, co-defendant called defendant and instructed him to meet at a designated address. When defendant arrived, co-defendant stated that he "aired dude out," meaning he shot the victim. Defendant then returned co-defendant's cellular phone and went home.

At the conclusion of defendant's statement, he provided that "at the time of the shooting, he feared for his life because if he didn't watch out for [co-defendant], the gang might do something real bad to him."

On cross-examination, ASA Bischoff admitted that defendant's attorney was not present when defendant gave his statement even though ASA Bischoff was aware that defendant had hired an attorney. ASA Bischoff additionally admitted that defendant's statement was not a verbatim recitation of her conversation with him.

At the close of the State's evidence, defense counsel motioned for a directed verdict; however, the motion was denied.

Detective Day testified for the defense that he never saw defendant leave the police station after initially arriving on January 9, 2004. Detective Day reiterated, however, that defendant agreed to spend the night at the police station.

In closing, defense counsel argued that defendant was never at the scene of the crime as demonstrated by the fact that none of the witnesses could identify him. Further, defense counsel emphasized inconsistencies in Aguayo's trial testimony compared to her grand jury testimony. Defense counsel specifically referenced the fact that Aguayo barely knew defendant and therefore could not accurately identify his voice on the night in question.

The jury found defendant guilty of first degree murder. Defendant subsequently hired a new attorney and filed a post-trial motion alleging, *inter alia*, ineffective assistance of trial counsel. Following a hearing during which extensive argument was allowed by both defendant's new counsel and the State, the trial court denied the motion. In so finding, the trial court determined that the Strickland prongs were not satisfied where defendant was not prejudiced by trial counsel's performance. Specifically, the court provided that defense counsel's performance was:

> "not incomprehensible. It was not illogical. It was not gibberish-filled. He had a theory. He had an alternative theory and he argued alternatively to the jury. That's not always an easy thing to do, but it's a theory that nonetheless has been found to be viable by our reviewing courts. The fact that he was not successful does not mean that he was defective in any way. And it certainly does not mean that [defendant] was prejudiced by those strategic matters."

Thereafter, defendant was sentenced to 45 years' imprisonment. In fashioning its sentence, the court relied on the pre-sentence investigation report and the arguments of counsel "within the framework of the [s]tatute that directs the Court to consider certain factors in aggravation and mitigation in imposing all sentences in criminal offenses." The court expressly provided that it considered the following: the facts of the case, in that defendant had knowledge of co-defendant's intent yet agreed to act as the lookout; the need to deter others from committing a similar crime; defendant's criminal history, in that he had a number of juvenile convictions, including possession of narcotics and weapons offense, and an adult drug conviction for which he received probation shortly before the underlying offense; the fact that defendant had been

a member of the Maniac Latin Disciples gang for five years despite the fact that he had an "unremarkable" childhood, in that his family was supportive, he attended school until his juvenile incarceration, had no dependency issues and no discernable social or mental issues, and had a four-year-old child; defendant had no steady employment; the victim's manner of death, in that there was no "provocation, justification, excuse; [or] reasonable explanation for what occurred"; and the probability that defendant would engage in future criminal activity. The trial court then denied defendant's motion to reconsider that sentence. This timely appeal followed.

Defendant first contends that his counsel was ineffective for failing to file a motion to quash his arrest and for abandoning his motion to suppress defendant's statement. The State responds that defendant has waived review of his claims. In the alternative, the State argues that the substance of defendant's claims do not warrant a new trial.

At the outset, we note that, in his brief, defendant heavily relies on police reports and a personal affidavit not admitted at trial. Defendant acknowledges that "ordinarily police reports would not be considered"; however, he encourages this court to consider the "facts" established by those documents, which he contends are properly before us because they were attached to his post-trial motion. We decline defendant's invitation and disagree that

the documents are properly before us. Notably, in violation of Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)), defendant fails to cite to any authority to support his proposition. Moreover, both documents were inadmissible hearsay evidence at the suppression hearing (see Cranwill v. Donahue, 132 Ill. App. 3d 873, 874, 478 N.E.2d 22, 87 Ill. Dec. 883 (1985)), and, therefore, neither document will be considered in addressing defendant's contentions.

We find the case cited by defendant, People v. Negron, 297 Ill. App. 3d 519, 697 N.E.2d 329, 231 Ill. Dec. 775 (1998), is distinguishable. In Negron, the court instructed that the affidavits attached to the defendant's brief, which allegedly supported his claim of ineffective assistance of counsel for failing to call named witnesses, were not properly before the court because, *inter alia*, they were not attached to the defendant's post-trial motion. Negron, 297 Ill. App. 3d at 537-38. Consequently, the Negron court concluded that the defendant's ineffective assistance claim was unsupported where there was no evidence illustrating the potential witnesses' testimony. Negron, 297 Ill. App. 3d at 537-38. In the case at bar, although defendant did attach the police reports and his personal affidavit to his post-trial motion, they remained improper additions to the record because they were inadmissible at the suppression hearing where Detectives Day and Kolman testified regarding the circumstances of defendant's arrest

and defendant could have, but did not, testify on his own behalf.

We now turn to defendant's substantive contentions. In order to successfully assert a claim for ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that his counsel's actions prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). Counsel's performance is presumed to be reasonable, and "strategic choices, made after investigating the law and the facts, are virtually unchallengeable." People v. Griffin, 178 Ill. 2d 65, 86, 687 N.E.2d 820, 227 Ill. Dec. 338 (1997). Moreover, to establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Griffin, 178 Ill. 2d at 74. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068. The defendant must satisfy both prongs of the Strickland test; however, the court need not review counsel's performance if the defendant fails to demonstrate resulting prejudice. Griffin, 178 Ill. 2d at 74; see People v. Albanese, 104 Ill. 2d 504, 527, 473 N.E.2d 1246, 85 Ill. Dec. 441 (1984) (courts need not review a defendant's individual claims when "even assuming, *arguendo*, that all of the alleged

errors constitute substandard representation, they would not have altered the result in [the] case.")

The State initially argues that defendant is estopped from asserting his claims where his trial counsel withdrew the challenged motion, which, contrary to defendant's assertion, was inclusive of quashing defendant's alleged illegal arrest, and defendant, after being admonished, expressly agreed with its withdrawal. As a result, the State maintains that, pursuant to the doctrine of invited error, review of defendant's claim is barred. Defendant responds that this court should not apply the doctrine of invited error to the instant case because the decision whether to file the motion was trial counsel's and thus, by logical extension, it was also counsel's decision whether to withdraw the motion. Consequently, defendant did not invite the error where he simply agreed with counsel's advice and received no benefit from that concession.

The doctrine of invited error provides that "an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." People v. Carter, 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 280 Ill. Dec. 664 (2003). The record clearly demonstrates, and defendant does not refute, that when asked whether he agreed with his counsel's decision to withdraw the motion, he acquiesced. The record further reveals that the court was careful to explicitly admonish defendant that withdrawal of the motion would bar it from ever

being litigated, then or in the future. Nonetheless, defendant assured the court that he wished to withdraw the motion based on his own free will. Consequently, we are not persuaded by defendant's argument that the doctrine of invited error should not apply in this instance because he merely agreed with his counsel's advice. See Morris v. Banterra Bank of Hamilton County, 159 Ill. 2d 551, 552, 640 N.E.2d 932, 203 Ill. Dec. 782 (1994) ("the party inducing the error must bear its consequences.") Defendant unequivocally knew the consequences of the request to withdraw the motion and agreed nonetheless. *Cf.* People v. Bailey, 375 Ill. App. 3d 1055, 1060, 874 N.E.2d 940, 314 Ill. Dec. 575 (2007) (the defendant's waiver of a motion to suppress his statement for fear of delaying trial did not encompass the challenged ineffective assistance claim for failing to file a motion to quash arrest and suppress subsequent physical evidence of which he was unaware).

Notwithstanding, waiver is a limitation on the parties and not the court (Carter, 208 Ill. 2d at 318); therefore, we review the merits of defendant's claim. Specifically, defendant argues that a motion to quash his arrest would have been successful at trial because he was arrested absent probable cause and the motion to suppress his statement would have been successful had it been fully litigated because his statement resulted from improper questioning after he invoked his rights to counsel and to remain

silent. The State responds that neither motion would have been successful where defendant was not under arrest prior to giving his inculpatory statement and his statement resulted from defendant's own reinitiation of contact, thus waiving his fifth amendment rights.

Traditionally, the question of whether to file a motion to quash arrest or to suppress a statement is a matter of trial strategy best left to the discretionary judgment of trial counsel. People v. Rodriguez, 312 Ill. App. 3d 920, 925, 728 N.E.2d 695, 245 Ill. Dec. 613 (2000). As a result, courts will not engage in hindsight analysis to determine whether counsel's decision was reasonably adequate under the circumstances. Rodriguez, 312 Ill. App. 3d at 925. That said, in order to prevail on a claim of ineffective assistance for failing to file a motion to quash and suppress, a defendant must establish that the motion would have been granted and the trial outcome would have been different if the evidence had been suppressed. Rodriguez, 312 Ill. App. 3d at 925.

The parties dispute whether and when defendant was placed under arrest. The State maintains that, at the point defendant was brought to the police station, he was merely a person of interest and not under arrest. In opposition, defendant repeatedly asserts that he was under arrest when he was brought to the police station and that there was no probable cause for that arrest because it was merely based upon the fact that Aguayo identified him as

having been at her house with co-defendant on the night in question.[3]

The facts do not support defendant's argument.[4] The record demonstrates, albeit scantily, that defendant voluntarily went to the police station, at least initially. In short order, defendant was interviewed by Detectives Day and Kolman at which time, according to Day, defendant inculpated himself in the victim's murder. Thereafter, defendant allegedly agreed to remain overnight at the police station in order to take a polygraph examination the following morning. There was no evidence presented at trial to dispute the above facts; however, assuming, *arguendo*, for purposes of resolving defendant's argument that he was under arrest when the decision was made that he remain at the police station overnight, defendant had already made an inculpatory statement, such that he acted as a lookout while co-defendant shot and killed the

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[3] Defendant attached an investigative alert to the appendix of his brief to support his argument that he was arrested absent probable cause. We note that attachments to briefs are not properly before this court (Multiut Corp. v. Draiman, 359 Ill. App. 3d 527, 534, 834 N.E.2d 43, 295 Ill. Dec. 818 (2005)), and, therefore, the investigative alert will not be considered.

[4] Defendant also repeatedly references the police reports which we previously determined may not be considered by this court.

victim. Consequently, at that point, there was probable cause for defendant's arrest. See People v. Morris, 229 Ill. App. 3d 144, 158, 593 N.E.2d 932, 171 Ill. Dec. 112 (1992) (probable cause exists when a reasonable person believes the facts and circumstances demonstrate that an offense has been committed and the defendant committed the offense). Accordingly, defense counsel's motion to quash arrest would not have been successful at trial and cannot provide the basis for a successful ineffective assistance claim. See Rodriguez, 312 Ill. App. 3d at 925-26.

We further conclude that defendant cannot support his claim of ineffective assistance of counsel for failing to fully litigate the motion to suppress because that motion would not have been successful. Defendant avers that his statement was inadmissible because it was taken after he invoked his rights to counsel and to remain silent. Moreover, defendant maintains that he did not reinitiate the dialogue which lead to his statement.

In People v. Olivera, 164 Ill. 2d 382, 647 N.E.2d 926, 207 Ill. Dec. 433 (1995), the Supreme Court succinctly provided:

> "An accused who has expressed the desire to deal with police only through counsel is not subject to further interrogation by authorities until counsel has been made

> available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police. [Citation.] Even if the accused initiates a conversation that takes place after he has expressed the desire to deal with the police only through counsel, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the fifth amendment right to have counsel present during the interrogation. [Citation.] If the court determines that the accused initiated the conversation in a way evincing a willingness and a desire for a generalized discussion concerning the investigation, it must make one other inquiry in determining whether a defendant has waived his right to the presence of counsel and his right to remain silent during custodial interrogation: whether the accused, by his or her [own] initiation of such a conversation, coupled with the totality of the other circumstances, knowingly and intelligently waived this right. [Citation.]" Olivera, 164 Ill. 2d at 389-90.

In the instant case, the facts demonstrate that defendant reinitiated the communication with

Detective Kolman and, despite repeated reminders of his rights and numerous opportunities to invoke those rights, defendant continued to discuss his involvement in the offense to Detective Kolman and later to ASA Bischoff. Indeed, according to Detective Kolman, on January 10, 2004, one day after defendant initially arrived at the police station, defendant knocked on the door of the interview room in order to obtain Kolman's attention. Detective Kolman then opened the door and asked defendant what he needed. When defendant simply responded that he wished to speak to him, Detective Kolman asked defendant if he had an attorney, and, if so, had the attorney advised defendant not to speak to the detectives. Because defendant responded yes to both queries, Detective Kolman asked defendant whether, in light of having previously invoked his rights, he still wished to have a conversation. Defendant remained steadfast in his desire to converse even after Kolman readvised him of his Miranda rights; therefore, a discussion ensued. Following their brief conversation, defendant further advised Detective Kolman that he wished to speak to an ASA. Consequently, it is clear that defendant both reinitiated the conversation "evincing a willingness and desire for a generalized discussion about the investigation" and knowingly and intelligently, after repeated reminders, waived his rights. Because we find that defendant's statement was admissible, he

cannot support a claim of ineffective assistance of counsel on that basis.

We are not persuaded by defendant's attempt to draw parallels between the facts of the instant case and those in Olivera. In Olivera, the Supreme Court found that the ambiguous question, "What happened?," posed by the defendant to a detective following his participation in a lineup, did not rise to the level required for reinitiation after a defendant has invoked his fifth amendment rights where that detective answered the defendant absent additional warnings. Olivera, 164 Ill. 2d at 390-91. The Olivera court distinguished Oregon v. Bradshaw, 462 U.S. 1039, 77 L. Ed. 2d 405, 103 S. Ct. 2830 (1983), where that defendant asked, "Well, what is going to happen to me now?," and the detective responded, much like Detective Kolman in our case, by reminding the defendant of his rights, stating that, since the defendant had requested an attorney, he should only speak to the detective based on his own free will. Olivera, 164 Ill. 2d at 391, citing Bradshaw, 462 U.S. at 1042, 77 L. Ed. 2d at 410, 103 S. Ct. at 2833. If a parallel is to be drawn, it is between the facts of our case and those of Bradshaw, where the Supreme Court concluded that the defendant reinitiated contact. Bradshaw, 462 U.S. at 1042, 77 L. Ed. 2d at 410, 103 S. Ct. at 2833. Moreover, we decline defendant's invitation to fashion a new rule requiring that police obtain express authorization from an

accused's attorney when it appears that the accused wishes to reinitiate a conversation.

Defendant next contends that he was denied his right to a fair trial when the State impermissibly introduced evidence regarding his post-Miranda silence in violation of Doyle and that his counsel was ineffective for allowing admission of that evidence. The State responds that this argument is waived where trial counsel agreed to the now-challenged language. In the alternative, the State argues that there was no violation because Doyle was not implicated.

In Doyle, the Supreme Court held that the due process clause generally prohibits the introduction of a defendant's post-arrest silence for purposes of impeachment. Doyle, 426 U.S. at 619, 49 L. Ed. 2d at 98, 96 S. Ct. at 2245. This court has further stated:

> "Illinois also recognizes an impropriety in drawing a negative inference from an accused's exercise of his right to remain silent, both because it impermissibly penalizes the accused for exercising his rights and because an accused's exercise of his right is not inconsistent with a claim of innocence. [Citation]. Further, the principles of Doyle apply even if the defendant remains only partially silent after his arrest and even if he does not

> take the stand at trial." People v. Bradley, 192 Ill. App. 3d 387, 391, 548 N.E.2d 743, 139 Ill. Dec. 358 (1989).

At issue is the reference to defendant having invoked his right to remain silent and to an attorney within his memorialized statement, which was published to the jury as follows:

> "[Defendant] met with an attorney on January 10th, 2004. He met with the attorney in the afternoon and then told the detectives that he wanted an attorney. Later, on January 10th, [defendant] knocked on the door of his interview room and told the detectives that he wanted to talk to them without an attorney. [Defendant] told Detective Day and Detective Kolman that he wanted to make a statement without his lawyer. After he told the [d]etectives he wanted to talk without a lawyer, Detective Kolman read him his Miranda rights again. [Defendant] then made a statement to the detectives.
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> On January 10th, at 9:45 p.m., [defendant] met with ASA Bischoff who asked him whether he initiated the conversation with the detectives. [Defendant] told ASA Bischoff that he

> knocked on the interview room door and told the detectives he wanted to make a statement. ASA Bischoff advised him of his rights and [defendant] told ASA Bischoff about the shooting."

Prior to trial, the State raised the issue of the propriety of the contested portion of defendant's statement and the court, with defense counsel's encouragement, determined that the challenged portion was admissible and not a violation of Doyle because defendant ultimately chose to speak to the detectives. We agree with that determination.

"Doyle applies only when a defendant invokes his right to remain silent." People v. Patterson, 217 Ill. 2d 407, 445, 841 N.E.2d 889, 299 Ill. Dec. 157 (2005). Although it is uncontested that defendant did invoke his right to remain silent at some point, we have also determined that defendant expressly reinitiated the dialogue with Detective Kolman, thus waiving his Miranda rights. "Once the right to remain silent has been waived, it can be invoked only by a defendant's positive assertion that he wants to remain silent." Patterson, 217 Ill. 2d at 445. The record does not support, and defendant does not contend, that he ever reasserted his right to remain silent. Accordingly, Doyle does not apply to the case at bar. As a result, defendant cannot support an ineffective assistance claim on that basis.

Defendant further contends that the trial court erred in allowing admission of gang-related evidence. The State responds that defendant has yet again waived review of this argument. In the alternative, the State argues that defendant overstated the character and quantity of the gang reference made at trial and that such evidence was admissible because it was relevant and probative.

We acknowledge that defendant failed to object to this alleged error at trial and has not argued on appeal that his counsel was ineffective for failing to do so; however, defendant did include the challenge in his post-trial motion. See People v. Enoch, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 119 Ill. Dec. 265 (1988) (failure to raise an objection both at trial and in a post-trial motion results in waiver). We additionally note that defendant failed to cite to the challenged statement in the record in violation of Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)). Notwithstanding, we address the merits of defendant's argument. See Carter, 208 Ill. 2d at 319 (waiver is a limitation on the parties and not the court).

Defendant argues that the State improperly admitted evidence that he was a member of the Maniac Latin Disciples street gang where there was no evidence that the offense at issue was connected to gang membership. Specifically, defendant takes issue with that portion of his statement, published to

the jury, in which he provided "at the time of the shooting, he feared for his life because if he didn't watch out for [co-defendant], the gang might do something real bad to him." In addition, defendant avers that the State improperly remarked on the gang-related evidence in rebuttal argument.

This court has held that "proof of gang membership is relevant and admissible where there is sufficient proof of a relationship between such affiliation and the crime charged, *e.g.*, to show motive or [a] common purpose." People v. Anderson, 153 Ill. App. 3d 542, 549, 505 N.E.2d 1303, 106 Ill. Dec. 512 (1987), citing People v. Hairston, 46 Ill. 2d 348, 263 N.E.2d 840 (1970). Admission of gang-related evidence will not be reversed absent a demonstration that the trial court abused its discretion. People v. Casillas, 195 Ill. 2d 461, 483, 749 N.E.2d 864, 255 Ill. Dec. 382 (2000).

In the case at bar, we find no error in the admission of defendant's statement. Initially, we note that, contrary to defendant's characterization, the statement at issue did not identify him as a gang member. The statement merely provided that "the gang" might retaliate if he did not obey co-defendant. Unlike at the abbreviated suppression hearing, no testimony was admitted regarding defendant's, co-defendant's and the victim's gang affiliations and no attempt was made to draw a connection between their affiliation and the victim's murder. Nevertheless, the statement is relevant in that it

provided the jury with a motive supporting defendant's reason for assisting co-defendant under the circumstances. Casillas, 195 Ill. 2d at 482 (gang affiliation is admissible so long as it is relevant). Furthermore, the State's brief remark in rebuttal regarding the challenged portion of defendant's statement was proper where, in closing, defense counsel insinuated that ASA Bischoff manufactured defendant's statement. See People v. Hopkins, 363 Ill. App. 3d 971, 987, 845 N.E.2d 661, 300 Ill. Dec. 772 (2005) (a prosecutor may reply to provocations in rebuttal). Consequently, we find no error.

Defendant additionally contends that he was deprived a fair trial as a result of the cumulative errors. More specifically, defendant argues that trial counsel did not subject the State's case to meaningful adversarial testing where he failed to effectively cross-examine the State's witnesses, failed to develop a coherent theory of defense and failed to call co-defendant's witness. Defendant further avers that he was denied a fair trial as a result of his counsel's ignorance of the law, as demonstrated by his failure to provide the correct mental state for accountability and rendering incorrect and inconsistent opening and closing remarks. The State responds that defendant impermissibly attempts to circumvent the Strickland standard by arguing his counsel's ineffective performance was presumptively prejudicial pursuant to United States v. Cronic, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984); however, the record

clearly demonstrates that trial counsel provided *some* adversarial testing, even if it was not perfect. Moreover, the State maintains that defendant cannot establish both prongs of the Strickland standard for any of his proposed "cumulative errors," the majority of which were matters of trial strategy. We agree.

In Cronic, the Supreme Court provided that, in narrow instances where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," ineffectiveness is presumed absent strict application of the Strickland standard. Cronic, 466 U.S. at 659, 80 L. Ed. 2d at 668, 104 S. Ct. at 2047. The Cronic standard, however, does not apply to the case at bar where review of the record reveals that counsel did subject the State's case to adversarial testing. See Wright v. Van Patten, 552 U.S. 120, 169 L. Ed. 2d 583, 588, 128 S. Ct. 743, 746 (2008); (Cronic applies when counsel is "'either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.'") quoting Cronic, 466 U.S. at 659, 80 L. Ed. 2d at 668, 104 S. Ct. at 2047. Indeed, defense counsel filed the initial motion to quash and suppress, only withdrawing it after a court recess subsequent to the presentation of the State's witnesses; cross-examined the State's witnesses at trial; filed a motion for a directed verdict; called Detective Day as a defense witness; and presented an opening statement and a closing argument. *Cf.* People v. Hattery, 109 Ill. 2d 449, 458-59, 488 N.E.2d 513, 94 Ill. Dec. 514 (1985)

(counsel presented no evidence; did not make closing arguments; attempted to develop a theory of defense that the defendant was compelled to kill the victims; and conceded that the defendant's confession was truthful).

We further conclude that defendant cannot satisfy the Strickland standard with regard to his specified cumulative errors. During his cross-examination of Aguayo, Rosalee and Navarro, defense counsel attempted to establish his theory of defense, namely, that no one saw defendant at the scene of the crime and Aguayo could not accurately identify defendant as the individual that called her home looking for co-defendant after the shooting occurred. Moreover, contrary to defendant's recitation of the facts, defense counsel did challenge the veracity of defendant's statement during his cross-examination of ASA Bischoff. Although it is true that defense counsel did not call co-defendant's witness, defendant's cursory mention that she "looked at Karlov as shots rang out and saw no-one [sic]" fails to provide us with any basis upon which to review whether such an "error" constituted ineffective assistance.[5] See Negron, 297 Ill. App. 3d at 537-38.

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[5] This is an issue that relies on matters outside the record and therefore cannot be reviewed on direct appeal. O'Brien v. City of Chicago, 285 Ill. App. 3d 864, 874, 674 N.E.2d 927, 221 Ill. Dec. 134 (1996).

In addition, we are not persuaded by defendant's argument that defense counsel was inconsistent in his opening and closing remarks; rather, review of the remarks as a whole demonstrates that, although not eloquently stated, defense counsel clearly attempted to focus the jury's attention on the burden of proof and the fact that no one identified defendant at the scene of the crime. On the issue of defense counsel's ignorance of the law as demonstrated by erroneously telling the jury that specific intent was an element of the crime, further review of the record demonstrates that defense counsel was merely attempting to argue that the evidence did not support an accountability conviction based upon the requirements of common design. Nevertheless, the jury was properly instructed at the conclusion of the case; therefore, no error resulted. See People v. Modrowski, 296 Ill. App. 3d 735, 743, 696 N.E.2d 28, 231 Ill. Dec. 299 (1998). Overall, defendant's cumulative "errors" accounted for trial strategies which fell within the wide range of reasonable performance. Griffin, 178 Ill. 2d at 86.

Finally, we are not persuaded by defendant's repeated attempts to discredit defense counsel based upon speculation that it was defense counsel's first criminal trial and his law firm did not list criminal defense as one of its specialties. Defendant failed to cite to authority to support his argument in violation of Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)). Moreover, although we are confounded as

to why defendant fired his respected and experienced initial attorney, a public defender, and then hired his alleged "inexperienced" trial counsel, no finding of ineffective assistance will be found on the bases discussed. "[E]ffective assistance of counsel refers to competent, not perfect, representation." People v. Palmer, 162 Ill. 2d 465, 476, 643 N.E.2d 797, 205 Ill. Dec. 506 (1994).

Defendant also contends that the State failed to prove him guilty beyond a reasonable doubt of first degree murder under the theory of accountability. The State responds that the evidence was sufficient to support defendant's guilt.

When reviewing the sufficiency of the evidence, this court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789 (1979). It is not this court's function to retry the defendant or substitute our judgment for that of the trier of fact. People v. Evans, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 283 Ill. Dec. 651 (2004). Rather, the trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony and resolves conflicts or inconsistencies in the evidence. Evans, 209 Ill. 2d at 211. In order to overturn the trial

court's judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. People v. Slim, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 130 Ill. Dec. 250 (1989).

A defendant is guilty of first degree murder when the State proves beyond a reasonable doubt that, in performing the acts which cause the death of an individual:

> "(1) he either intends to kill that individual, or knows that such acts will cause death to that individual; or (2) he knows that such acts create a strong probability of death to that individual." 720 ILCS 5/9 -1(a)(1), (a)(2) (West 2002).

Further, a defendant will be held legally accountable for the conduct of another when:

> "Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2002).

People v. Joya, 319 Ill. App. 3d 370, 381, 744 N.E.2d 891, 253 Ill. Dec. 158 (2001).

In order to prove that a defendant had the intent to promote or facilitate a crime, the State must establish beyond a reasonable doubt that either: (1) he shared the criminal intent of the principal offender; or (2) there was a common criminal design. People v. Perez, 189 Ill. 2d 254, 266, 725 N.E.2d 1258, 244 Ill. Dec. 371 (2000). "Accountability may be established through a person's knowledge of and participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself." Perez, 189 Ill. 2d at 267. A defendant's mere presence at the scene of the crime is insufficient to prove accountability, even if the individual has knowledge that a crime is being committed or flees from the scene (People v. Williams, 324 Ill. App. 3d 419, 434, 753 N.E.2d 1089, 257 Ill. Dec. 463 (2001)); however, in determining whether a defendant is accountable, the trier of fact may consider: (1) the defendant's presence during the planning of the crime; (2) his presence during the commission of the crime; (3) his flight from the scene; (4) his failure to report the incident; and (5) his continued association with the principal after the commission of the crime. Perez, 189 Ill. 2d at 267; see People v. Batchelor, 171 Ill. 2d 367, 376, 665 N.E.2d 777, 216 Ill. Dec. 519 (1996). A common purpose or design may be inferred based upon the surrounding circumstances and words of agreement are not

necessary to establish such purpose or design. Batchelor, 171 Ill. 2d at 376. Moreover, "[a]cting as a lookout constitutes aiding and abetting in the commission of an offense." People v. Johnson, 318 Ill. App. 3d 281, 290, 743 N.E.2d 150, 252 Ill. Dec. 576 (2000).

After reviewing the record, we conclude that there was ample evidence to demonstrate that defendant was accountable for the victim's first degree murder. Defendant initially accompanied co-defendant to Aguayo's house, where co-defendant obtained a dark, hooded sweatshirt. Defendant then inquired why they remained in what he described as a "hot" neighborhood, at which time co-defendant showed defendant that he was armed with a handgun. Notwithstanding, defendant agreed to walk with co-defendant to a bar approximately one block away. At some point, defendant learned that co-defendant intended to retrieve money from the victim and, if the money was not repaid, that co-defendant planned to shoot the victim. Despite this disclosure, defendant accepted co-defendant's cellular telephone with the instructions that defendant was to "watch [co-defendant's] back in case the police came" and, in that event, alert co-defendant by shouting "yo." Defendant then stood across the street from the bar for up to 25 minutes while co-defendant waited for the victim. After the victim appeared and co-defendant shot him, defendant moved to a nearby location and waited an additional 30 to 40 minutes

before attempting to find co-defendant using the provided cellular phone. When co-defendant eventually called, the pair met at a designated location at which point co-defendant confirmed that he "aired [the victim] out" and defendant returned co-defendant's cellular phone. Defendant never alerted the police.

Although, as we stated, mere presence, even combined with knowledge of the crime or flight after the crime, is not enough to support an accountability conviction, the instant defendant knew that co-defendant was armed and learned, prior to the shooting, co-defendant's intentions, yet remained outside the bar for a significant time after the shooting and then reconnected with co-defendant afterword. Furthermore, despite defendant's repeated argument that he never expressly agreed to act as co-defendant's lookout, the evidence need not show that he verbally agreed to act as a lookout, especially where the circumstances demonstrated that he acquiesced. See Batchelor, 171 Ill. 2d at 376. When defendant took co-defendant's cellular telephone, he was given clear instructions to notify co-defendant if the police arrived. Defendant accepted the phone; remained on the scene until co-defendant safely fled; confirmed that co-defendant successfully shot the victim when the pair reconnected; and never reported the incident. See Perez, 189 Ill. 2d at 267; see also Williams, 324 Ill. App. 3d at 435. We, therefore, conclude that a

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt where the evidence was not so unsatisfactory, improbable or implausible to raise such a doubt.

Relying on People v. Estrada, 243 Ill. App. 3d 177, 611 N.E.2d 1063, 183 Ill. Dec. 415 (1993), defendant argues that he cannot be held liable on a theory of accountability because he did not know co-defendant's plan until they were already outside the bar and there was no evidence to the contrary. In Estrada, the court stated that, in order to be convicted based upon a common plan or purpose, the evidence must disclose, "at least by inference, that in addition to being present at the scene of the crime, the accountable party had some advanced knowledge of the criminal plan or scheme." Estrada, 243 Ill. App. 3d at 184-85. The Estrada court, however, did not define how far in advance the accountable party must be aware of the impending crime, and defendant does not cite, and our research has not revealed, an express time frame. According to defendant's statement, he was aware of co-defendant's plan prior to its execution. *Cf.* Estrada, 243 Ill. App. 3d at 185 (no evidence that the defendant was aware the co-defendant intended to shoot the victim; rather, the defendant's actions demonstrated that he had no knowledge of the co-defendant's plan based upon the fact that he put himself in the line of fire). Moreover, defendant's statement that he acted as a lookout is sufficient to

support his conviction. See Johnson, 318 Ill. App. 3d at 290.

In sum, we find that defendant received effective assistance of counsel and a fair trial, and that the evidence demonstrated beyond a reasonable doubt that he was accountable for the victim's death. Accordingly, we affirm defendant's conviction.

During oral argument, we noted the length of defendant's sentence and requested that the parties provide supplemental briefs addressing the matter. In accordance therewith, defendant argues that his 45-year sentence was excessive pursuant to his limited involvement in the offense, his minor criminal record and his potential for rehabilitation. The State responds that defendant's sentence was proper.

A trial court is generally considered the best place to determine a defendant's sentence; therefore, we will not disturb that sentence absent an abuse of discretion. People v. Walker, 262 Ill. App. 3d 796, 807, 635 N.E.2d 684, 200 Ill. Dec. 345 (1994). The trial court, however, does not enjoy unfettered discretion; rather, even in instances where the sentence is within the presumptively proper proscribed statutory limitations, "an abuse of discretion may be found where the sentence greatly varies with the purpose and spirit of the law." People v. Maldonado, 240 Ill. App. 3d 470, 485, 608 N.E.2d 499, 181 Ill. Dec. 426 (1992). A sentence must be

balanced between the seriousness of the offense and a defendant's rehabilitative potential. Maldonado, 240 Ill. App. 3d at 485. Nevertheless, "the trial court is not required to articulate its consideration of mitigating factors [citation] or to make an express finding that the defendant lacked rehabilitative potential [citation]. Nor is the trial court required to accord greater weight to defendant's potential for rehabilitation than to the seriousness of the crime." People v. Boclair, 225 Ill. App. 3d 331, 335-36, 587 N.E.2d 1221, 167 Ill. Dec. 606 (1992). In order to provide the proper balance, in fashioning its sentence, the trial court must consider:

> "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education." Maldonado, 240 Ill. App. 3d at 485-86, citing People v. Center, 198 Ill. App. 3d 1025, 1033, 556 N.E.2d 724, 145 Ill. Dec. 106 (1990).

This Court has the power, pursuant to Supreme Court Rule 615(b)(4) (134 Ill. 2d R. 615(b)(4)), to reduce an excessive sentence where the record demonstrates that the trial court abused its

discretion. People v. Clark, 374 Ill. App. 3d 50, 69, 869 N.E.2d 1019, 312 Ill. Dec. 28 (2007). A reviewing court, however, must be cautious in considering the propriety of a sentence and "must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." People v. Fern, 189 Ill. 2d 48, 53-54, 723 N.E.2d 207, 243 Ill. Dec. 175 (1999), citing People v. Streit, 142 Ill. 2d 13, 19, 566 N.E.2d 1351, 153 Ill. Dec. 245 (1991).

In the case at bar, defendant was almost 22 years old when he acted as a lookout while co-defendant shot and killed the victim. Prior to that time, defendant was a gang member for five years, from the age of 15 until the age of 20. In terms of his criminal record, defendant had one felony drug conviction for which he received one year of probation. Significantly, however, defendant received the felony drug probation just two months prior to committing the instant offense. Moreover, defendant had a number of juvenile convictions, including drug and weapons offenses, for which he also received probation. Defendant, however, also violated his juvenile probation and was incarcerated in a juvenile detention facility. Defendant was forced to withdraw from high school as a result and never returned despite an expressed desire to obtain his GED. Notwithstanding, defendant was raised in a supportive family and has a close relationship with his daughter, who was four years old at the time of sentencing.

Review of the record reveals that the trial court did not abuse its discretion in determining defendant's sentence. The court announced that it considered the pre-sentence investigation report, arguments of counsel in aggravation and mitigation and the requisite statutory framework. The court specified that defendant's sentence resulted from consideration of the facts of the case, including the victim's unprovoked death; his criminal history; his gang participation; his "unremarkable" childhood and supportive family, including his daughter; his inability to obtain steady employment; his propensity to commit future crimes; and the necessity for deterrence.

Although the sentence is substantial, it is within the statutory limits (see 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2002))[6] and we cannot say that it violates the spirit and purpose of the law. See Maldonado, 240 Ill. App. 3d at 485. We acknowledge that defendant's participation in the instant offense was relatively minor, in that he acted as the lookout; however, "[t]he accountability statute (720 ILCS 5/5-2(c) (West 1996)) effectively bars courts from considering the offender's degree of participation in the crime by

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[6] Section 5-8-1(a)(1)(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(a)(1)(a) (West 2002)) provides that the range of sentencing for first degree murder is not less than 20 years and not more than 60 years; however, section 5-8-1(a)(1)(d)(i) of the Code (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2002)) provides a 15-year enhancement when the offense was committed while armed with a firearm.

making all persons who participate in a common criminal design equally responsible." People v. Miller, 202 Ill. 2d 328, 340, 781 N.E.2d 300, 269 Ill. Dec. 503 (2002), citing People v. Cooper, 194 Ill. 2d 419, 434-35, 743 N.E.2d 32, 252 Ill. Dec. 458 (2000) (an exception found where the juvenile defendant's sentenced to natural life in prison without the possibility of parole under the multiple-murder sentencing statute was unconscionable under the specific facts of the case); see also People v. Rodriguez, 229 Ill. 2d 285, 293, 891 N.E.2d 854, 322 Ill. Dec. 563 (2008) ("[w]hen a defendant aids or abets another in committing a crime, he is accountable and maybe punished for any criminal act, any of his co-defendants had done in furtherance of the crime" including being armed with a firearm). Further, defendant has been given more than one chance to rehabilitate himself, yet he has refused those opportunities and continued to participate in criminal activity. Moreover, the trial court was in the best position to determine the appropriate sentence and we will not disturb that sentence merely because we may have weighed factors differently. See Fern, 189 Ill. 2d at 54 (rejecting comparative sentencing analysis). Consequently, we find that defendant's sentence was proper.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.

QUINN and COLEMAN, JJ., concur.

No. 108137

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
respondent,

v.

VICTOR VELEZ,
petitioner.

Decided May 28, 2009.

OPINION

Petition for leave to appeal denied.

VICTOR VELEZ' WRITTEN STATEMENT

Victor was advised that ASA Bischoff is an assistant state's attorney and a prosecutor and is not his lawyer. Victor is 21 years old and went through his second year of high school at Kelvyn High School. He can read and write English.

Victor met with an attorney, Ezra Hemphill, on January 10, 2004. He met with the attorney in the afternoon and then told the detectives that he wanted an attorney. Later, on January 10th, Victor knocked on the door of his interview room and told the detectives that he wanted to talk to them without an attorney. Victor told Det. Day and Det. Kolman that he wanted to make a statement without his lawyer. After he told the Detectives he wanted to talk without a lawyer, (initials omitted) Det. Kolman read him his Miranda rights again. Victor then made a statement to the detectives.

On January 10th, at 9:45 PM, Victor met with ASA Bischoff who asked him whether he initiated the conversation with the detectives. Victor told ASA Bischoff that he knocked on the interview room door and told the detectives he wanted to make a statement. ASA Bischoff advised him of his rights and Victor told ASA Bischoff about the shooting.

Victor has known Jesus Vega for 7 years. He has identified Ex # 1 as a photo of Jesus Vega. Jesus Vega goes by the nicknames of "Little KK" and "Chuito." On Dec. 29, 2003, Victor was hanging out in the middle of the block between Cortland and Armitage on Keystone. Jesus came up to Victor and asked Victor to go with him to get a hoodie from Edna's house.

Victor and Jesus walked to Edna's house which is located at Armitage and Karlov. When they got to Edna's (initials omitted) house, Victor and Jesus stood on the sidewalk on the other side of the fence. Edna and her brother came out of the house when they arrived. Edna gave Jesus the sweatshirt (initials omitted) by throwing it over the fence. The sweatshirt was gray with a hood. Jesus and victor talked to Edna and her brother about going to the clubs and dancing with girls. Edna and her brother went back into the house, but her brother came back out and jumped in a car to go the clubs.

Victor and Jesus stayed in front of Edna's house. Jesus put on the gray sweatshirt and told Victor to chill—we'll be here for 10 or 15 minutes. Victor asked him why they were standing there because it's a hot neighborhood. Jesus told him to chill because he had a pistol and pulled a .357 revolver-chrome in color from his coat pocket and showed it to Victor. Jesus told Victor to walk with him real fast and they walked down Karlov to

Cortland to Keystone and then down Armitage to Karlov.

Jesus told Victor that "this nigger in the bar owes me some money and I'm going to shoot this nigger if he doesn't give me the money." Jesus gave him a cell phone and told him that if anything happens to him, he would call and find out where he was at. Jesus told Victor to watch his back in case the police come and to call out "Yo" if Victor saw the police. Jesus stood across the street on Armitage, across the street from the bar. Victor stood on Karlov around the corner from the bar. Victor paced back and forth. They were there for about 20 or 25 minutes when the guy came out of the bar. He now knows the guy to be Joso Soto who goes by the nickname of "Chiwee." He did not know it was Joso Soto at the time of the shooting. (initials omitted). When the guy came out of the bar, a car pulled up in front of the bar. The guy went up to the passenger side of the car. The passenger window in the front was open. The guy leaned into the window and was talking. Jesus was creeping between the cars on Armitage and came up to the guy—they were face to face. When the guy saw Jesus, Jesus fired one shot at the guy and the guy turned around (initials omitted) as though he was going to run back into the bar. Jesus then fired another 5 or 6 times at the guy. The guy ran down Armitage towards Pulaski. Victor ran (initials omitted) down Karlov to Keystone.

Victor stayed on Keystone for about 30 or 40 minutes and then used Jesus's cell phone to call Edna. Victor asked Edna if "little KK" was there and she told him he was not there. Right after that, Jesus called Victor and told him to meet him in the hallway at Keystone and Cortland. Victor walked over to the hallway and gave Jesus his cell phone back. Jesus said to Victor, (initials omitted) "aired dude out" which is slang for I shot him. Victor went home after he gave Jesus his cell phone in the hallway.

Victor and Jesus saw each other after this night, but they didn't talk about the shooting.

The police have treated him well and have not promised him anything in exchange for this statement. The detectives have not threatened him and have given him something to eat, drink and have allowed him to sue the washroom. He had a cot in his interview room and has slept since he have been at the police station. The assistant states attorney has treated him well and has not promised him anything in exchange for this statement nor threatened him. The ASA spoke to Victor alone and he stated that the police have treated him well and he has no complaints about his treatment at Area 5. ASA Bischoff advised Victor that he could give a videotaped statement and Victor said he would rather give a handwritten statement. (/s/ Victor Velez & Jeanne Bischoff).

ASA Bischoff read this statement out loud to Victor and told him to make any corrections, changes or additions to this statement. Victor read the first few lines out loud to demonstrate that he could read ASA Bischoff's handwriting. (/s/ Victor Velez & Jeanne Bischoff).

Victor stated that at the time of the shooting, he feared for his life because if he didn't watch out for Jesus, the gang might do something real bad to him. (/s/ Victor Velez & Jeanne Bischoff).